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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF WYOMING,
Petitioner,
v.
UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Wyoming

BRIEF OF THE VILLAGE OF RUIDOSO AS *AMICUS CURIAE* IN SUPPORT OF THE STATE OF WYOMING

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QUESTION PRESENTED

In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific tribe?

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BRIEF OF THE VILLAGE OF RUIDOSO AS *AMICUS CURIAE* IN SUPPORT OF THE STATE OF WYOMING

The *Amicus Curiae*, The Village of Ruidoso, a political subdivision of the State of New Mexico, respectfully urges that this Court reconsider and reject "practicably irrigable acreage" ("PIA") as the standard for quantification of a federal reserved water right for agricultural purposes on an Indian reservation and adopt a standard which grants sufficient water to assure the Indian people living on the reservation a moderate standard of living. The Village of Ruidoso further urges that if the Court retains PIA as the standard for quantifying reserved water rights for agricultural purposes, the economic anal-

ysis or quantification must take into account the unique historical characteristics of water use on and off the reservation on which the federal reserved water rights are being quantified.

INTEREST OF THE *AMICUS CURIAE*

The Village of Ruidoso diverts water from the Rio Ruidoso, a tributary of the Hondo River in Lincoln County, New Mexico, for the purpose of supplying municipal, domestic, sanitation and commercial water to the residents of the Village. The Village's point of diversion on the Rio Ruidoso is located a short distance downstream from the point of diversion of the Mescalero Apache Tribe on the portion of the Rio Ruidoso located within the Mescalero Apache Reservation. The estimated population of the Village is 10,000 and a total of 6,683 water meters are served within the municipal limits.

Approximately 90% of the water delivered through the Village's municipal water supply system is for domestic and sanitary purposes. The water rights of the Village, consisting of both surface and groundwater rights, were provisionally adjudicated in an omnibus stream system adjudication proceeding known as *State ex rel. S.E. Reynolds, State Engineer v. L.T. Lewis, et al.* Chavez County District Court Cause No. 20294 and 22600, Consolidated. In this same case the federal reserved water rights of the Mescalero Apache Tribe are being adjudicated. The Tribe claimed, *inter alia*, the right, based upon the practicably irrigable acreage standard, to divert from the Rio Ruidoso and consume a total of some 4,700 acre feet a year with a priority earlier than all Non-Indian water right priorities. While 4,700 acre feet a year from the Rio Ruidoso Stream System pales in comparison to the awards of water to the Shoshone and Arapaho Tribes in the instant case, the report prepared by the expert witness for the Village showed that such an amount repre-

sents more than half of the total annual average discharge of the Rio Ruidoso at the reservation boundary. The District Court of Chaves County, per LaFel Oman, District Judge Pro Tempore, (and former Chief Justice of the New Mexico Supreme Court) rejected on evidentiary grounds the Tribe's claim to a federal reserved water right on the basis of practicably irrigable acreage (*see* Appendix A to the *Amicus Curiae* brief of the State of New Mexico). The Court, however, did uphold practicably irrigable acreage as an appropriate method of quantification of a future agricultural water right for the Tribe. An appeal by the Tribe and the United States of the Court's decision is probable. In the event the Court's decision on the Tribe's practicably irrigable acreage claim was reversed and the Tribe's right to a federal reserved water right based on PIA confirmed, the Village's future ability to deliver water to its inhabitants would be substantially impaired.

SUMMARY OF ARGUMENT

PIA, as a standard of quantification for federal reserved water rights on Indian agricultural reservations, is not related to the real needs of the Indian people. Presently, PIA is used by the United States and the Tribe to create property rights in water vastly in excess of what is necessary to support the agricultural purpose of the reservation. PIA is at odds with the decisions of this Court with respect to the quantification of federal reserved water rights for Non-Indian federal reservations. It is grossly inequitable to other water users in what are often water short stream systems with rights long established under State law.

A standard of quantification for agricultural Indian reservations which recognizes the need of the Indian people to attain a moderate standard of living is not only consistent with the recent decisions of this Court but is fair to all parties directly affected by the quantification

of the Indian reserved water right. If, however, the Court decides to retain PIA in some form the lower courts should be instructed to require the United States and the Tribe to undertake an economic analysis which takes into account economic impacts or the opportunity costs on historical uses of water on and off the Indian reservation.

ARGUMENT

I. PRACTICABLY IRRIGABLE ACREAGE SHOULD BE REJECTED AS THE STANDARD FOR QUANTIFYING A FEDERAL RESERVED WATER RIGHT FOR AGRICULTURAL INDIAN RESERVATIONS. IN ITS PLACE A STANDARD OF QUANTIFICATION SHOULD BE ADOPTED WHICH GRANTS A FEDERAL RESERVED WATER RIGHT TO THE TRIBE BASED UPON THE MINIMAL NEEDS OF THE INDIVIDUAL RESERVATION WHICH WILL PROVIDE THE INDIAN PEOPLE LIVING ON THE RESERVATION A MODERATE LIVING.

The *Amicus Curiae*, Village of Ruidoso joins with the Petitioner, and the Western States who support the Petitioner as *amici curiae* in urging this Court to reject practicably irrigable acreage ("PIA") as the only standard of quantification of an implied federal reserved water right for agricultural Indian reservations. The Village of Ruidoso further concurs with the contention of the Petitioner and the other *amici* that the PIA standard should be replaced with a standard of quantification which affirms the Tribe's reserved right in the natural resources of the reservation in an amount necessary to meet the Tribe's minimal needs and provide a moderate standard of living. This new standard would require that the Tribe be awarded only that amount of water sufficient to assure that the primary purpose of the reservation is not entirely defeated and the Indian people on the reservation enjoy a moderate living.

Adoption by the Court of a new standard would result in the quantification of federal reserved water rights for

Indian Tribes being brought into line with the standard of quantification for all other federal reservations. There is simply no basis in policy or law for disparate treatment of federal reserved water rights for Indian reservations and Non-Indian federal reservations. If such a dichotomy ever did make sense it is now clear that the difficulties encountered by the lower courts in implementing two substantially distinct standards of quantification furnishes abundant reason for this Court to abolish PIA.

The unfortunate truth is that PIA as a standard of quantification of a federal reserved water right for Indian agricultural reservations has been seized upon by the United States and the Tribes as a means for acquiring a property right in a large amount of water without any regard to the real needs of the Indians. Additionally, the United States and the Tribe generally claim a priority date for the Tribe's water rights which is earlier in time than the water rights of all, or at least most, Non-Indian users. In the arid west where many stream systems are already chronically over appropriated the imposition of another substantial draft on the stream system ahead of appropriations long established under state law can lead only to severe economic dislocation to those users.

The enormous award of water to the Respondent Tribes in the instant case, without any demonstrated need for the water, and on a reservation where State approved water rights were relinquished and other state water rights already exist, fully points out the fallacy of the PIA quantification standard. Similarly, the federal reserved water right claims of the Mescalero Apache Tribe in *L.T. Lewis* presents yet another dramatic example of how the PIA approach is abused by the United States and the Tribe. The executive order setting aside that portion of the Mescalero reservation in which the Tribe and the United States claimed PIA as the standard of quantification for the proposed water project was for grazing purposes only. Despite this inconvenient historical fact the United States and the Tribe, under

the guise of a "permanent homeland" for the Tribe, claimed the right to divert thousands of acre feet of water a year from the water short Rio Ruidoso stream system. This water would be used to irrigate approximately 2800 acres of land, deemed to be practicably irrigable. The locale of this project is not even within the same portion of the reservation where the Rio Ruidoso drainage lies. Rather the United States and the Tribe proposed to transport the water by means of a series of intricate tunnels and pipelines to lands in a separate drainage.

While Justice Oman in his decision on the Mescalero claims in *L.T. Lewis* correctly found that the project was not economically feasible, he ruled nevertheless that PIA was the appropriate standard of quantification of a future agricultural water right for the Mescalero Tribe. He further ruled that the analysis presented by the United States and the Tribe failed to meet the PIA standard because it did not take into account all the benefits and all costs regardless to whom they accrue.

Unlike the Wyoming Supreme Court which gave short shrift to the this issue, Justice Oman recognized that a proper benefit/cost analysis to determine the economic feasibility of an Indian water project must take into account economic impacts beyond the boundaries of the reservation. (See Point II below.)

This Court made it clear in a series of cases since its landmark decision in *Arizona v. California*, I, 373 U.S. 546 (1963) that PIA may have outlived its usefulness as the sole standard of quantification for all Indian reservations. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979). This case followed the Court's decision in *Cappaert v. United States*, 426 U.S. 128 (1976) that the only water reserved for the federal reservation in that case was to meet the "minimal needs" of the reserva-

tion 426 U.S. 128 (1976). This Court found in *Fishing Vessel* that the Indians were entitled to a right to the natural resource involved in that case to provide the Indians with a "moderate living". 443 U.S. at 686.

The instant case furnishes the Court with the opportunity to lay to rest once and for all PIA as the sole standard of quantification of an Indian agricultural reserved water right and adopt in its place a standard which quantifies the Indian federal reserved water rights in an amount which is sufficient to meet the minimal needs of the Tribe and not defeat the primary purpose of the reservation. Cf. *United States v. New Mexico*, 438 U.S. 696 at 700 (1978). If the Tribe wishes to expand the use of water on the reservation for purposes beyond the primary purpose Congress originally mandated, the Tribe must acquire the existing rights of other water users in the stream systems. Compare *United States v. New Mexico* at 702. This approach fairly protects the rights of all users on the stream system while, at the same time, allowing the Tribe to meet its goal of a moderate standard of living for its people. Because PIA fully distorts the process of determining federal reserved water rights for Indian agricultural reservations, it should no longer be followed.

II. IF PRACTICABLY IRRIGABLE ACREAGE IS RETAINED AS THE STANDARD FOR QUANTIFYING FEDERAL RESERVED WATER RIGHTS FOR AGRICULTURAL PURPOSES ON AN INDIAN RESERVATION, THE QUANTIFICATION OF PRACTICABLY IRRIGABLE ACREAGE SHOULD TAKE INTO ACCOUNT THE UNIQUE HISTORICAL CHARACTERISTICS OF WATER USE ON AND OFF THE RESERVATION WHERE FEDERAL RESERVED WATER RIGHTS ARE BEING QUANTIFIED.

In *Arizona I*, the Court adopted PIA as the standard by which to measure federal reserved water rights for agricultural and related uses on Indian reservations. As its rationale, the Court cited favorably the

Special Master's ruling that the quantity of the water intended to be reserved should satisfy both present and future needs of the reservations. Given the difficulty of defining future needs, the Court agreed with the Master that irrigable acreage was the only feasible and fair way to determine the amount of reserved water. *Id.* at 600-601. The test of PIA was economic feasibility or benefit/cost analysis, specifically, "a finding that annual benefits exceed costs." Report of the Special Master, *Arizona v. California*, hereafter Arizona II, No. 8 Original (Feb. 22, 1982), pp. 90, 94 and 100.

Benefit/cost analysis is an assessment of the benefits of reallocating resources and comparing those benefits to the costs associated with the reallocation. There are three distinguishing characteristics of a benefit/cost analysis: (1) it attempts to capture all the benefits and all the costs in a resource allocation regardless to whom they accrue; (2) benefits are measured by consumer willingness to pay for the goods or services being provided, which is not necessarily the market price; and (3) costs are measured in terms of opportunity costs or what society gives up when it moves a resource from one use to another use.

Arizona I was brought for the purpose of allocating compact entitlement between the States of the Lower Colorado River Basin. Recent cases have involved the statutory adjudication of water rights among individual users who have a long history of rights under state law. Since *Arizona I*, the methodology used to quantify PIA has not been uniformly or consistently applied, particularly in cases involving conflicting claims between Indian and non-Indian claimants. Indian tribes in these cases have attempted to alter the economic standards of *Arizona I* in order to maximize the reserved rights they seek. *L.T. Lewis* is a case in point.

In *L.T. Lewis*, the economic evidence presented to the Court reflected a disagreement between the parties over the conceptual approach and methodology that should be

used to conduct a benefit/cost analysis of the Mescalero Apache Tribe's proposed agricultural project, which was the basis of its claim for some 4,700 acre feet per year of reserved water rights. The State and the Non-Indian Defendants contended that the economic standards employed should be the same for all water projects, including those on Indian reservations. The United States and Mescalero Tribe disagreed, asserting that current water project standards were inappropriate to quantify reserved water rights for Indian tribes.

At issue in *L.T. Lewis* was whether the opportunity costs or what society gives up when it transfers a resource from one use to another should be included in the analysis. The State and Non-Indian Defendants pointed out that the studies of the project prepared by the United States and the Tribe did not take into account any opportunity costs or economic impacts of the project that would accrue outside the reservation boundary. The State and the non-Indian defendants contended that any assessment of the economic feasibility of the proposed project must include all costs as well as all benefits of diverting the waters of the Rio Ruidoso, whether they would accrue on or off the reservation or affect Indians or Non-Indians. The reservation is intertwined with the regional economy and therefore, to limit the analysis to the reservation alone as the United States and the Tribe did was a deviation from the economic feasibility standards of *Arizona I*.

The United States and the Mescalero Tribe acknowledged that their feasibility study did not include any opportunity costs outside the reservation boundary. Their study did, however, include benefits accrued off the reservation. Their explanation of this inconsistency was that the quantification of Indian reserved water rights is unique and therefore, the conceptual approach that typically underlies a benefit/cost analysis may vary on a case by case basis. In *L.T. Lewis*, they asserted that off-reservation impacts should not be considered in the quantification of the Tribe's water rights. Only those

costs that would accrue on the reservation were considered in their economic analysis.

By limiting the scope of their study to the boundaries of the reservation, the United States and the Mescalero Tribe excluded major opportunity costs that would accrue off the reservation. This exclusion enabled the United States and the Tribe to calculate a benefit cost ratio biased in favor of the project's economic feasibility.

To buttress their contention that economic analysis used to quantify Indian water rights should exclude opportunity costs that accrue off the reservation, the United States and the Tribe argued that standard benefit/cost methodology was modified by the doctrine of prior appropriation. They conceded that an opportunity cost is normally an essential element of an economic analysis, notwithstanding prior appropriation.

Benefit/cost analysis was the analytical tool the Mescaleros themselves selected to quantify their rights. The State and non-Indian defendants argued that in using benefit/cost analysis to determine economic feasibility, foregone costs of prior appropriated uses of the water would routinely be part of the calculus.

The United States and the Mescalero Tribe also objected to the inclusion of opportunity costs that would accrue off the reservation on the grounds that it would constitute a weighing of the equities between Indians and non-Indians. They equated weighing of the equities enunciated by this Court in *Cappaert v. United States*, *supra*, at 138, with the sensitivity doctrine enunciated by this Court in *United States v. New Mexico*, *supra*, at 696. The State and the non-Indian defendants successfully argued that neither the sensitivity doctrine nor a balancing of competing interests should apply to the issue of whether opportunity costs should be evaluated. The question in *L.T. Lewis* was whether the Court should exclude an element of benefit/cost analysis, *i.e.*, opportunity costs, when considering the economic feasibility of an Indian project.

The United States and the Tribe's approach to economic feasibility corrupted the process and rendered fanciful the purpose of an economic feasibility test. By altering the standards of a benefit/cost analysis to suit their purpose, the United States and Tribe insured that the results would be favorable.

In *L.T. Lewis*, Justice Oman held that commonly accepted, standard economic procedures must be followed in applying a benefit/cost analysis and that no special rules should apply to an economic feasibility analysis of a proposed Indian water project. Justice Oman also held that an economic analysis is based on the concept of opportunity cost. He also ruled that the foregone benefits of users that would be incurred are relevant external opportunity costs that should be considered under a properly constituted economic feasibility study.

Justice Oman also found that the United States and Tribe omitted numerous off-reservation economic costs, including lost agricultural production along the Lower Rio Ruidoso, fishery losses, property devaluation, and the costs of constructing alternative municipal water supplies. Justice Oman concluded that under generally accepted standards for economic feasibility analysis, the agricultural project proposed by the United States and the Mescalero Tribe was not economically feasible.

The deviations from the PIA methodology of *Arizona I* were largely rejected in *L.T. Lewis*. Like the Mescalero Tribe in *L.T. Lewis*, the Shoshone and Arapaho Tribes in *In re General Adjudication of All Rights to Use Water in the Big Horn Stream System*, 753 P.2d 76 (Wyo. 1988), hereafter *Big Horn*, restricted their evaluation of their agricultural project to the costs within the boundaries of the reservation, thereby excluding any economic impacts or opportunity costs that would accrue off the reservation. The Tribes' analysis, like that of the Mescalero Tribe in *L.T. Lewis*, took into account the benefits of the project whether they accrued on or off the reservation. This conceptual approach was challenged by the

State and the Non-Indian Defendants, who pointed out that the inclusion of on and off reservation benefits and the exclusion of off reservation costs would distort the results of the analysis by increasing the apparent feasibility of the project. The Special Master in *Big Horn* rejected this argument and ruled that no opportunity costs accruing off the reservation could be introduced as evidence.

Like the Mescaleros in *L.T. Lewis*, the Shoshone and Arapaho Tribes also treated some of the costs within reservation boundaries as benefits. Envisioning that a substantial number of unemployed Indians would be employed by the project, the Tribes argued that their employment would be a benefit and included it in their analysis. The Tribes acknowledged that labor would be a cost to them and would be treated as a cost in a standard benefit/cost analysis. Nonetheless, the Special Master in *Big Horn* upheld the Shoeshone and Arapaho Tribes' deviation from standard methodology. In *L.T. Lewis*, the State and the Non-Indian Defendants successfully challenged the Mescaleros' treatment of labor costs as benefits. They were also successful in convincing Justice Oman that the Mescaleros had distorted standard benefit cost analysis and that the proposed agricultural project was economically infeasible.

Given the conflicting decisions in *L.T. Lewis* and *Big Horn*, it is essential that if the concept of PIA is retained as the standard of measurement for federal reserved water rights that it be coupled with instructions to the lower courts that economic feasibility studies adhere to the following principles of a benefit/cost analysis:

1. All benefits and all costs must be captured in a resources allocation regardless to whom they accrue.

2. Benefits should be measured by consumer willingness to pay for the goods or services being provided, which is not necessarily the market price; and

3. Costs should be measured in terms of opportunity costs of what society gives up when it moves a resource from one use to another use.

CONCLUSION

This Court should hold that PIA is no longer the sole standard of quantification of a federal reserved water right for an agricultural Indian reservation. In its place, the Court should adopt a quantification standard which meets the minimal needs of the primary purpose of the reservation while providing the Indian people living on the reservation a moderate living. Such a standard is consistent with the decisions of this Court and recognizes that in water short stream systems as presently exist in most western states the established rights of water users under State law should be respected. If this Court retains the concept of PIA or some form thereof, the lower courts should be instructed to determine the economic feasibility of an Indian water project in the context of all costs and all benefits whether they accrue on or off the reservation.

Respectfully submitted,

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